A

TIONG ING SOON v. PP

COURT OF APPEAL, PUTRAJAYA
ABDUL RAHMAN SEBLI JCA
RHODZARIAH BUJANG JCA
KAMALUDIN MD SAID JCA
B [CRIMINAL APPEAL NO: Q-05(M)-429-11-2016]
8 OCTOBER 2018

CRIMINAL LAW: *Murder – Defence – Insanity – Mens rea during commission*
C *of murder – Whether defence of insanity concerned with legal responsibility or medical insanity – Whether accused suffered psychiatric condition that impaired cognitive faculties at material time so as to be classified as medically insane – Whether incapable of knowing nature of act – Whether acts of accused consistent with conduct of intelligent person with clear presence of mind – Whether defence of insanity available – Penal Code, ss. 84 & 302*

D

Hii Siik Ling ('PW6') and her daughter were riding a motorcycle driven by the deceased when PW6 noticed that there was a plastic sheet stuck to the front tyre which made some noise. PW6 asked the deceased to stop the motorcycle and PW6 got down from the motorcycle. After checking, and as PW6 was going back to the motorcycle, she saw the appellant approach and
E stabbed the deceased at the chest. The appellant then pulled the motorcycle and stabbed the deceased all over the body. PW6 tried to defend the deceased and at the same time shouted for help. However, the appellant turned his back and attacked PW6. The deceased died after the incident. Based on the post mortem by the forensic specialist, the cause of death was stab injury to
F the chest by a sharp cutting weapon. The appellant was charged for the offence of murder of the deceased under s. 302 of the Penal Code ('PC'). He was also charged and tried with two additional charges of causing grievous hurt to PW6, an offence under s. 326 of the PC. There was no issue of *actus reus* of the appellant in this case. The only issue before the trial judge was
G the *mens rea* of the appellant, *ie*, whether the appellant was legally insane at the time of the commission of the offence under s. 302 of the PC. In his defence, the appellant denied murdering someone and stated that he did not know what had happened on the day of the incident. The appellant also relied on the evidence of the consultant forensic psychiatrist ('DW2') that the
H appellant was diagnosed with schizotypal personality disorder and was under medication for 20 years. The appellant stated that he did not know the deceased. However, DW2, in his testimony stated that a person suffering from schizotypal personality disorder would be able to think rationally and could control his emotions. It was DW2's opinion that it would be highly possible that the appellant was not suffering from psychotic disorder and that
I would be in legal *McNaughton* rule that at the time of the offence, the appellant was most likely not suffering from the disease of the mind. At the end of the trial, the judge found that the appellant had failed to prove, on the

balance of probabilities, that he was legally insane at the time of the commission of the offence of murder. The appellant was accordingly convicted for the charge of murder and sentenced to the mandatory death penalty and acquitted and discharged against the two charges under s. 326 of the PC. The appellant filed an appeal to the Court of Appeal against the conviction under s. 302 of the PC whilst the prosecution appealed against the order of acquittal. However, the prosecution's appeal against the order of acquittal and discharge was subsequently withdrawn. The issue in this appeal concerned the *mens rea* during the commission of the offence, *ie*, whether the appellant was legally insane and that the defence of insanity pursuant to s. 84 of the PC was available to him.

Held (dismissing appeal; affirming conviction and sentence against appellant)
Per Kamaludin Md Said JCA delivering the judgment of the court:

(1) The defence of insanity under s. 84 of the PC is concerned with the legal responsibility of the accused person at the time of the alleged offence and not whether he was medically insane at that time. There must be a finding based upon medical evaluation that the accused was suffering from some kind of psychiatric condition that impaired his cognitive faculties at the material time so as to be classified as medically insane. Further, in order to be legally insane, the accused must be determined by reason of that psychiatric condition to have lost his cognitive faculties to a degree such that he is incapable of knowing the nature of his act or that what he is doing is wrong or contrary to law. (para 30)

(2) The cumulative effects of all the facts led to one and only conclusion that, at time of the commission of the offence, the appellant knew what he was doing and also knew what he was doing was wrong in law. The appellant also was able to give evidence on oath and answered most of the questions in a rational manner without too much difficulty. The appellant did not behave abnormally throughout the trial. The whole conduct of the appellant on the day of the incident, from the time he stabbed the deceased, attacked PW6, threw away the knife and ran away from the scene of the incident and hiding himself until arrested by police were patently inconsistent with acts of someone who was mentally unsound and incapable of knowing the nature and consequences of his acts. Such acts were consistent with the conduct of an intelligent person with a clear presence of mind. (paras 34 & 35)

(3) Therefore, the court was satisfied on the totality of the evidence that, at the time of committing the offence, the appellant was not labouring under any form of unsoundness of mind and he knew that the nature of what he did was against the law. It was in fact a pre-meditated murder. The trial judge had applied the correct approach in determining whether the appellant had successfully proven a defence of insanity pursuant to

A s. 84 of the PC and had not committed any error in fact or in law that warranted appellate intervention. The conviction was found to be safe and well supported by evidence. (paras 35-37)

Bahasa Malaysia *Headnotes*

B Hii Siik Ling ('PW6') dan anak perempuannya menunggang motosikal yang dipandu oleh si mati apabila PW6 ternampak sehelai plastik tersangkut pada tayar bahagian hadapan yang menyebabkan bunyi bising. PW6 meminta si mati menghentikan motosikal dan PW6 turun dari motosikal itu. Selepas memeriksa, dan semasa PW6 kembali ke motosikal, dia nampak perayu
C menghampiri dan menikam si mati di bahagian dada. Perayu kemudian menarik motosikal dan menikam badan si mati bertubi-tubi. PW6 mencuba membantu si mati dan pada masa yang sama menjerit meminta tolong. Walau bagaimanapun, perayu berpusing dan menyerang PW6. Si mati meninggal dunia selepas insiden tersebut. Berdasarkan bedah siasat oleh pakar forensik, sebab kematian adalah kecederaan tikaman di dada dengan senjata tajam.
D Perayu dituduh atas kesalahan membunuh bawah s. 302 Kanun Keseksaan ('KK'). Dia juga dituduh dan dibicarakan dengan dua pertuduhan tambahan mengakibatkan kecederaan teruk kepada PW6, satu kesalahan bawah s. 326 KK. Tiada isu *actus reus* perayu dalam kes ini. Satu-satunya isu di hadapan hakim bicara ialah *mens rea* perayu, iaitu, sama ada perayu tidak siuman dari
E segi undang-undang pada masa kesalahan bawah s. 302 KK dilakukan. Dalam pembelaannya, perayu menafikan membunuh sesiapa dan menyatakan dia tidak mengetahui apa yang berlaku pada hari kejadian itu. Perayu juga bersandar pada keterangan pakar psikiatri forensik perunding ('DW2') bahawa perayu didiagnos dengan kecelaruan personaliti skizotipal
F dan mengambil ubatan selama 20 tahun. Perayu menyatakan bahawa dia tidak mengenali si mati. Walau bagaimanapun, DW2, dalam keterangannya menyatakan bahawa seseorang yang mengalami kecelaruan personaliti skizotipal akan boleh berfikir secara rasional dan boleh mengawal emosinya. DW2 berpendapat bahawa ada kemungkinan besar bahawa perayu tidak
G mengalami kecelaruan psikotik dan, dalam kaedah *McNaughton,* adalah sah bahawa pada masa kesalahan, kemungkinan besar perayu tidak terganggu fikirannya. Di akhir perbicaraan, hakim mendapati perayu gagal membuktikan, atas imbangan kebarangkalian, bahawa dia tidak siuman dari segi undang-undang pada masa kesalahan dilakukan. Perayu dengan itu disabitkan atas pertuduhan membunuh dan dijatuhkan hukuman mati
H mandatori dan dilepaskan dan dibebaskan daripada dua pertuduhan bawah s. 326 KK. Perayu memfailkan rayuan ke Mahkamah Rayuan terhadap sabitan bawah s. 302 KK manakala pihak pendakwaan merayu terhadap perintah pelepasan. Walau bagaimanapun, rayuan pendakwaan terhadap perintah pelepasan dan pembebasan kemudiannya ditarik balik. Isu dalam
I rayuan ini berkait dengan *mens rea* semasa kesalahan dilakukan, iaitu, sama ada perayu tidak siuman dari segi undang-undang dan dia boleh menggunakan pembelaan tak siuman menurut s. 84 KK.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman terhadap perayu)

Oleh Kamaludin Md Said HMR menyampaikan penghakiman mahkamah:

(1) Pembelaan tak siuman bawah s. 84 KK berkait dengan tanggungjawab perayu dari segi undang-undang pada masa kesalahan yang didakwa dan bukan sama ada dia tidak siuman dari segi perubatan pada masa itu. Perlu ada dapatan berdasarkan penilaian perubatan bahawa tertuduh mengalami masalah psikiatrik tertentu yang melemahkan kebolehan kognitif pada masa itu yang boleh diklasifikasikan sebagai tidak siuman dari segi perubatan. Selanjutnya, untuk diterima sebagai tak siuman dari segi undang-undang, mesti ditentukan bahawa akibat masalah psikiatrik itu, tertuduh kehilangan kebolehan kognitif sehingga ke tahap dia tidak boleh mengetahui sifat tindakannya atau apa yang dilakukannya adalah salah atau bertentangan dengan undang-undang.

(2) Kesan kumulatif kesemua fakta menjurus pada hanya satu kesimpulan, iaitu pada masa kesalahan tersebut dilakukan, perayu mengetahui apa yang dilakukannya dan juga mengetahui bahawa apa yang dilakukannya adalah salah dari segi undang-undang. Perayu juga berupaya memberi keterangan bersumpah dan menjawab hampir kesemua soalan secara rasional dan tanpa banyak kesulitan. Perayu tidak berkelakuan secara luar biasa di sepanjang perbicaraan. Kesemua tindakan perayu pada hari kejadian, dari masa dia menikam si mati, menyerang PW6, membuang pisau itu dan melarikan diri dari tempat kejadian dan menyembunyikan dirinya sehingga ditangkap polis jelas tidak konsisten dengan seorang yang tidak siuman dan tidak berupaya mengetahui sifat dan akibat perbuatannya. Tindakan sedemikian konsisten dengan tindakan orang yang bijak dengan pemikiran yang jelas.

(3) Oleh itu, mahkamah berpuas hati bahawa atas keseluruhan keterangan bahawa, pada masa kesalahan dilakukan, perayu tidak mengalami apa-apa bentuk kecelaruan fikiran dan dia mengetahui apa yang dilakukan bersifat menentang undang-undang. Pada hakikatnya, kesalahan itu telah dirancang terlebih dahulu. Hakim bicara mengguna pakai pendekatan yang betul dalam mempertimbangkan sama ada perayu berjaya membuktikan pembelaan ketaksiuman menurut s. 84 KK dan tidak melakukan apa-apa kekhilafan dari segi fakta dan undang-undang yang mewajarkan campur tangan rayuan. Sabitan didapati selamat dan disokong keterangan.

Case(s) referred to:
Goh Yoke v. PP [1969] 1 LNS 48 FC ***(refd)***
John Nyumbei v. PP [2007] 2 CLJ 509 CA ***(refd)***
PP v. Ismail Ibrahim [1998] 2 CLJ 213 HC ***(refd)***
PP v. Misbah Saat [1998] 1 CLJ 759 HC ***(refd)***
PP v. Shalima Bi [2016] 2 CLJ 231 CA ***(refd)***
PP v. Zainal Abidin Mohd Zaid [1993] 1 CLJ 147 HC ***(refd)***
Rajagopal v. PP [1976] 1 LNS 122 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 342
Evidence Act 1950, s. 105
Penal Code, ss. 84, 302, 326

For the appellants - Wee Wui Kiat; M/s Batternberg & Talma Advocs
For the respondent - Mohd Zain Ibrahim & Jasmee Hameeza; DPPs

[Editor's note: Appeal from High Court, Sibu; Criminal Trial No: SBW-45-5-3-2015 (affirmed).]

Reported by S Barathi

JUDGMENT

Kamaludin Md Said JCA:

Introduction

[1] The appellant was preferred with the following charge before the High Court at Sibu, Sarawak:

> That you, on or about the 25th day of August 2006, at about 19.30 hrs, at Lembangan Lane, of Central Road, Sibu, in the district of Sibu, in the state of Sarawak, did commit murder by intentionally causing the death of Soon Pek Lian (F) KPT 821103-13-5548 by stabbing the said deceased at the chest, with a knife and that you have thereby committed an offence punishable under section 302 of the Penal Code.

[2] At the conclusion of the trial, the appellant was found guilty and convicted of the offence as charged and sentenced to suffer the death penalty.

[3] The appellant appealed against the said conviction and sentence. We heard the appeal on 15 October 2018. After examining the appeal records and considering the written and oral submissions of the parties, we unanimously found the appeal has no merit and dismissed the appeal. We affirmed the conviction and sentence handed down by the High Court. We now give our grounds.

Background Of The Case

[4] Initially, the appellant was preferred with three charges. The appellant was charged and tried for committing the offence of murder of one, Soon Pek Lian (the deceased) and he also charged and tried with two additional charges

of causing grievous hurt to one Hii Siik Ling (PW6) which is an offence under s. 326 of the Penal Code. At the end of trial, the learned judge convicted the appellant with murder charge and sentenced him to the mandatory death penalty. With regards to the two charges under s. 326 of the Penal Code, the learned trial judge had acquitted and discharged the appellant. The appellant filed an appeal to the Court of Appeal against the conviction under s. 302 of the Penal Code whilst the prosecution appealed to the Court of Appeal against the order of acquittal. Later, the prosecution withdrew the appeal against the order of acquittal and discharge on the two charges under s. 326 of the Penal Code. Thus, the prosecution's appeal was struck off.

[5] The Court of Appeal, after hearing the appellant's appeal, unanimously dismissed the appeal.

[6] The appellant appealed to the Federal Court against the decision of the Court of Appeal. On 10 March 2015, the Federal Court had allowed the appeal by the appellant and directed as follows:

(a) rayuan perayu di bawah Seksyen 302 Kanun Keseksaan adalah dibenarkan;

(b) sabitan dan hukuman Mahkamah Tinggi yang dikekalkan oleh Mahkamah Rayuan diketepikan;

(c) rayuan dikembalikan ke Mahkamah Tinggi Sabah dan Sarawak di Sibu di hadapan hakim yang lain untuk dibicarakan;

(d) perayu untuk mengemukakan Pemeriksaan Perubatan yang lengkap bagi perbicaraan; dan

(e) tarikh 12.3.2015 ditetapkan untuk sebutan di Mahkamah Tinggi Sabah dan Sarawak di Sibu.

[7] The case was brought before another High Court Judge in order to give opportunity to the appellant to come out with the medical examination report on his mental capacity so as to substantiate his defence of insanity under s. 84 of the Penal Code.

Facts Of The Case

[8] On 25 August 2006, at about 7.30pm, Hii Siik Ling (PW6) and her daughter, Ling Siew Yin (PW11), were riding a motorcycle driven by the deceased along Lembangan Lane Sibu. PW6 then noticed that there was a plastic sheet stuck to the front tyre which made some noise. After that, PW6 asked the deceased to stop the motorcycle at the same site of the murder. The deceased then stopped the motorcycle. PW6 got down from the motorcycle. After checking and as PW6 was going back to the motorcycle, she saw the appellant approaching and stabbed the deceased at the chest. The appellant then pulled the motorcycle and stabbed the deceased all over the body. PW6 tried to defend the deceased and at the same time shouted for help. The

A appellant turned his back and attacked PW6. The deceased died after the incident. The forensic specialist, Dr A Savior Selva Suresh who did the post mortem testified that the cause of death was due to stab injury to the chest by sharp cutting weapon.

The Trial

B

[9] At the commencement of the trial, both prosecution and the defence agreed that the notes of proceeding of the previous trial of the appellant and all exhibits tendered therein, shall be adopted for purpose of this trial (see the notes of proceedings on 22 December 2015 at p. 168 of the record of appeal vol 2).

C

[10] It was also agreed that there is no issue of *actus reus* of the appellant in this case. The only issue before the trial judge is the *mens rea* of the appellant at the time of commission of the offence under s. 302 of the Penal Code that is whether the appellant was legally insane at the time of the commission of the offence under s. 302 of the Penal Code.

D

[11] Based on the aforesaid, the prosecution had called the investigation officer (PW1) to confirm that the appellant was ordered by the Federal Court to undergo a medical observation and psychiatric evaluation. The appellant was sent to the Hospital Mesra, Bukit Padang, Kota Kinabalu on 17 April 2015. The doctor who attended the appellant was Dr. Emmanuel Joseph Pereira. PW1 received the doctor's report in July 2015. The psychiatric report dated 3 July 2015 was identified by PW1 and marked as exh. P2 (see the notes of proceedings at pp. 165 to 168 of the record of appeal vol. 2).

E

F

[12] The defence had made it clear that it would be relying on the defence of insanity pursuant to s. 84 of the Penal Code.

[13] The appellant (DW1) was called to give evidence. His evidence is that he was arrested by the police because the police said he had murdered a lady whom he did not know. He also said that he did not know why he was charged for. He claimed that he did take medicine for mental disorder prior to the incident and on medication for 20 years. He had also been treated as a psychiatric patient. He admitted that it was wrong to murder the lady but did not know why it was wrong. The appellant stated that he did not know what kind of psychiatric illness he was suffering. During cross-examination, the appellant confirmed that he was at all the time on medication but admitted that he was normal when he was on medication (see the notes of proceedings at pp. 170 to 175 of the record of appeal vol 2).

G

H

[14] The defence called DW2, Dr Emmanuel Joseph Pereira to give evidence. He was referred to the psychiatric report dated 3 July 2015 which he prepared and marked as exh. P2. DW2 was asked to explain what is meant by "Schizotypal Personality" at item 3.1 of the Past Psychiatric

I

History stated in P2. DW2 gave his explanation and on suggestion that the person of schizotypal personality disorder is a one of unsound mind, he did not agree. It is DW2's evidence that a person suffering schizotypal personality disorder would be able to think rationally and can control his emotion. DW2 was further asked by the defence counsel to tell what the state of mind of the appellant was during the alleged offence. He gave his opinion that it would be highly possible that the appellant was not suffering from psychotic disorder and that would be in legal *McNaughton* rule that at the time of the offence, he was most likely not suffering from the disease of mind. He reiterated his stand that the appellant was not suffering from psychotic illness.

[15] During the cross-examination, DW2 stated that the appellant was admitted in his facility for almost three months and was assessed regularly by him, his colleagues and his staffs throughout his stay. DW2 did not find any psychotic symptoms in him and stated then in his report on p. 5 at para. 8.2. When referred to exh. P2 - Psychiatric report prepared by Dr Rajinder Singh that had excluded any mental or psychotic symptoms during the diagnosis of the appellant, DW2 explained that what was meant is that the appellant did not have any psychotic symptoms. He agreed with the prosecution that from the record, prior to 2006, ie, at the time of commission, of the offence, the appellant did not have any mental illness. In conclusion DW2 stated that in the appellant's case, he had mild intellectual disability in which the impairment was not severe. He still could perform or function quite normally in many areas except for his social skill and reasoning.

[16] DW2 was asked by the court to state his opinion whether the appellant was legally insane at the time of the commission of the offence. DW2 gave his opinion that the appellant is not legally insane (see the notes of proceedings at pp. 176 to 187 of the record of appeal vol 2).

Prosecution's Case

[17] The prosecution submitted that there are sufficient evidence to show that the appellant had intention to murder the deceased. The weapon used is a knife which is a deadly weapon. At the time of incident, the appellant was seen to have chased and even tried to stab PW6. The deceased had multiple injuries which the prosecution alleged that the appellant had deliberately stabbed and slashed the deceased forcefully with the knife. The brutal act of the appellant was done with the intention of causing death. The appellant inflicted injuries on the vital part of the deceased body and based on the post mortem report, injury on the chest of the deceased caused her death. After he stabbed the deceased and attacked PW6, he fled the scene and threw the knife he had used into the rubbish bin. The knife was later found by the police based on the information given by the appellant.

[18] The prosecution submitted that the burden is on the appellant to prove his insanity as required under s. 84 of the Penal Code. What the court need to consider is whether the appellant has successfully established, as a preliminary issue, that at the time of committing the act, the appellant was of unsound mind and if he was unsound mind, whether he has proven his unsoundness of mind at a degree to satisfy one of the test; that the appellant was incapable of knowing the nature of his act being wrong or against the law. In this case, the prosecution submitted that the appellant did not suffer any mental illness and he was more than fit to know the nature of his act as being wrong and against the law. Based on the evidence, the appellant had no history of mental illness. Furthermore, for the purpose of this case, the appellant had been referred to two different psychiatrists for mental evaluation. Both of them come with the same conclusion that the appellant did not suffer any mental illness except one personality disorder which has nothing to do with his cognitive faculties. The prosecution submitted that the appellant failed the first test. Based on the evidence, the appellant was mentally stable at the time of the commission of the crime, the defence of unsoundness of mind under s. 84 of the Penal Code was not available for the appellant.

Defence Case

[19] The defence relied on the appellant's evidence that he was arrested because the police said he murdered a lady. He denied of murdering someone and did not know the reason for being charged. The appellant did not know what happened on the day of incident. It was submitted that this was consonant with his insanity. The appellant also showed that he did not remember what happened on that night. There is nothing to show or suggest that the appellant lied or was not a truthful witness. The defence also relied on DW2's evidence that the appellant was diagnosed with schizotypal personality disorder since 2006 and was under medication. The appellant had been taking medicine for mental disorder and had been taking it for 20 years. On *mens rea* to commit murder, the defence relied on the appellant's same evidence and further he did not even know the lady. As such, the facts show that there was no motive on the part of the appellant to cause the injuries that led to the death of the lady. The defence also relied on DW2's evidence where he had testified in cross-examination that in this case there was a *mens rea* for offence of stealing or theft but he could not establish the *mens rea* for murder.

Finding Of The High Court

[20] At the end of the trial, the learned judge having heard the testimonies of the witnesses, considered the exhibits tendered and the written submissions of the learned counsel for the parties, found that the appellant had failed to prove on the balance of probabilities that he was legally insane at the time of the commission of the offence of murder. In that premises, the

court found the appellant was guilty of the offence of murder in accordance with the offence against him and convicted him and sentenced him to death by hanging by the neck until he is dead provided by s. 302 of the Penal Code.

This Appeal

[21] Counsel for the appellant in his submission before us had raised four main grounds to state that the learned judge had erred in finding that the appellant was not medically insane as follows:

(a) The consultant forensic psychiatrist Dr. Emmanuel Joseph Pereira (DW2) never stated in his psychiatric report dated 3 July 2015 (P2) that the appellant was not medically insane at the time of the alleged offence;

(b) DW2 was never asked about the state of mind at the time of offence under s. 84 of the Penal Code;

(c) DW2 was only admitted under s. 342 of the Criminal Procedure Code which required DW2 to state if the appellant was fit to plea and stand trial or not; and

(d) DW2 in his psychiatric report dated 3 July 2015 (P2) only stated that the appellant was fit to plea and stand trial.

[22] In the above premises, it was submitted that the whole basis or substratum of the entire psychiatric report of DW2 was wrong. It was not prepared with the purpose of determining the state of mind of the appellant at the time of the alleged offence as per s. 84 of the Penal Code. As such, it was submitted that the learned High Court Judge had committed a grave error in assessing the first tier test, namely whether the appellant was medically insane.

[23] On the other hand, the prosecution submitted that the learned judge had aptly addressed his mind to the legal principle of legal insanity under s. 84 of the Penal Code that would entitle the appellant for a total acquittal ie, a complete defence. It was further submitted that the learned judge had taken into consideration the evidence by Dr Emmanuel Joseph Pereira (DW2) and the evidence given in response to the question by the court that the appellant was not legally insane at the time he committed the offence. The learned judge had also taken into account that the appellant was not even medically insane.

Our Decision

[24] As agreed by parties, there was no issue of *actus reus* of the appellant but rather only the *mens rea* during the commission of the offence whether the appellant was legally insane and that the defence of insanity pursuant to s. 84 of the Penal Code was available to him.

[25] The learned High Court Judge in his finding had stated as follows:

> [26] From the testimony and the Psychiatric Report dated 3.7.2015 (P2) of the Consultant Forensic Psychiatrist, Dr. Emmanuel Joseph Pereira (DW2), it is clear that the appellant was not medically insane as DW2 stated *inter alia* that the appellant was diagnosed as having Schizotypal Personality Disorder and had Mild Intellectual Disability. The accused was also diagnosed as appearing to have some features of paraphilia disorder including Sadism (sexual arousal from giving pain) and Fetishism (the use of non-sexuaI or non-living objects or part of person's body to gain sexual excitement, in this case buttock fetishism).
>
> [27] This Court finds that the accused was not even medically insane, let alone legally insane. The accused's Schizotypal personal Disorder, Mild Intellectual Disability and paraphilic disorder including Sadism (sexual arousal from giving pain) and Fetishism (the use of non-sexual or non-living objects or part of person's body to gain sexual excitement, in this case buttock fetishism), were not major mental illness. It was only a personality and paraphilic disorder. This Court is only concerned with legal insanity. It was for the accused to prove that he was legally insane at the time he committed the act and not for the prosecution to prove otherwise.
>
> [28] Further this Court finds that the accused was not mentally unstable at the time of the commission of the crime and he knew what he was doing was wrong in nature. This what he said during cross-examination, as follows:
>
> Q64: Do you know why you were arrested, isn't it?
>
> A: Yes
>
> Q65: Do you know murder a person is a wrong in law?
>
> A: Yes
>
> [29] These pieces of evidence had clear to show to this Honorable Court that the accused was not mentally unstable at the time of the commission of the crime and surely, he knew what he was doing and he knew that what he was doing is wrong in nature.
>
> [30] The above pieces of evidence were strongly corroborated by the psychiatrist evidence and their respective reports which clearly stated that at the time of the crime, the accused was mentally stable.

[26] We noted that the learned judge had before arriving at his decision to convict and sentence the appellant to death stated the correct principle of law on s. 84 of the Penal Code. Section 84 of the Penal Code provides as follows:

> Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

[27] We would like to state that where s. 84 is in issue, three principles of law require consideration. Firstly, every person is presumed to be sane until the contrary is established, the onus of the prosecution is not merely to establish that the accused committed the offence but also to establish that he had the necessary *mens rea* to commit the offence and the onus of proving insanity is on the accused under s. 105 of the Evidence Act 1950 (See: *PP v. Ismail Ibrahim* [1998] 2 CLJ 213; [1998] 3 MLJ 243).

[28] The learned judge had rightly referred to the case of *John Nyumbei v. PP* [2007] 2 CLJ 509, where the Court of Appeal laid down the legal principles relating to the defence of unsoundness of mind as follows:

> 10. The law on unsoundness of mind as a complete defence in our criminal jurisprudence is, as was correctly submitted by learned counsel for the appellant, contained in s. 84 of the Penal Code. It states:
>
> > 84. Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.
>
> 11. This section exempts a person found to be insane of any criminal responsibility if it is found that he is "incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law" (see commentary in *Ratanlal and Dirajlal's Law of Crimes*, 25th edn, p 280). The learned authors there further commented that a person "is not protected if he knew that what he was doing was wrong, even though he did not know that it was contrary to law, and also, if he knew what he was doing was contrary to law even though he did not know that it was wrong.
>
> 12. Thus, under s. 84 Penal Code, criminality has to be determined according to that legal test and not merely by the mental state of an accused person according to the medical test.
>
> 13. There is a distinction between the notion of a legal insanity and medical insanity. Not every form of insanity exempts a person from criminal responsibility. Only legal insanity provides that exemption under s. 84 Penal Code. The specie of insanity addressed by s. 84 is the one that impairs the cognitive faculties of a person. Its nature and extent must be that to make the offender incapable of knowing the nature of his act, or that he is doing is wrong or contrary to law. The criminality of an act therefore must be determined by this test laid down in s. 84 as distinguished from the medical test (see *Ratanlal and Dhirajlal's Law of Crimes*, 25 edn, p 280).

[29] The case of *PP v. Shalima Bi* [2016] 2 CLJ 231 explained the difference between legal and medical insanity in the following terms:

> Legal and Medical Insanity
>
> [51] The law is trite that the court is only concerned with legal insanity and not with medical insanity. Section 84 of the Code is concerned with legal insanity and not with medical insanity. The distinction between legal

and medical insanity has been explained by the learned authors of *Ratanlal and Dhirajlal's Law of Crimes* 26th edn in the following terms at p. 307:

> 7. 'Medical insanity' and 'legal insanity'. - There is a good deal of difference between 'medical insanity' and 'legal insanity' and courts are concerned only with the legal and not the medical aspect of the matter. It is not every kind of frantic humour or something unaccountable in a men's action, that points him out to be a mad man, to be excepted from punishment. It is not mere eccentricity or singularity of manner that would suffice the plea of insanity. Abnormality of mind is not by itself sufficient to show that the accused must have acted while of unsound mind. Such exemption can be claimed only when the insane person is incapable of knowing the nature of the act or he is doing either wrong or contrary to law.

[52] Thus, where medical insanity has been established, the defence of insanity under s. 84 of the Code is only available where, at the time the accused committed the act, he:

(a) did not know the nature of his act; or

(b) did not know that what he was doing was wrong; or

(c) did not know that what he was doing was contrary to law.

[53] What a trial judge has to do as the first step in determining whether the defence of insanity has been established is to see whether the accused was medically insane at the time he committed the act. Expert medical evidence is necessary as the question of whether he was medically insane at any particular point in time is in the realm of forensic science. It is not something that the court can determine without the benefit of expert opinion.

[54] Once that threshold is crossed, the next step is for the trial judge to consider whether, by reason of medical insanity, the accused was incapable of knowing the nature of his act or that what he was doing was either wrong or contrary to law. Expert medical opinion is irrelevant as the question of whether the accused was incapable of knowing the nature of his act or that he was doing what was either wrong or contrary to law is a matter to be inferred from the proved facts and circumstances and not from expert medical opinion. It is purely a question of fact for the trial judge to determine.

[30] From the authorities, firstly, there must be a finding based upon medical evaluation that the accused was suffering from some kind of psychiatric condition that impaired his cognitive faculties at the material time so as to be classified as medically insane. This of course is a matter for a medical expert to determine. But is not conclusive. Secondly, in order to be legally insane, the accused must be determined by reason of that psychiatric condition to have lost his cognitive faculties to a degree such that he is incapable of knowing the nature of his act or that what he is doing is

wrong or contrary to the law. This stage is for the court to determine from the evidence adduced during the trial. The defence of insanity under s. 84 of Penal Code is concerned with the accused's legal responsibility at the time of the alleged offence and not whether he was medically insane at that time (see: *Pendakwa Raya v. Zainal Abidin Mohd Zaid* [1993] 1 CLJ 147; *PP v. Misbah Saat* [1998] 1 CLJ 759; [1997] 3 MLJ 495). The burden is on the appellant to prove his insanity as required under s. 84 of the Penal Code and the standard of proof is on a balance of probabilities (see: *Goh Yoke v. PP* [1969] 1 LNS 48; [1970] 1 MLJ 63; *Rajagopal v. PP* [1976] 1 LNS 122; [1977] 1 MLJ 6).

[31] The appellant was relying on the psychiatrist report by Dr Emmanuel Joseph Pereira dated 3 July 2015 (P2) and DW2 was called as the defence witness (DW2). The evidence of DW2 is very crucial to the defence to prove whether the defence of insanity pursuant to s. 84 of the Penal Code is available to the appellant.

[32] The learned judge had considered the evidence of Dr Emmanuel Joseph Pereira (DW2) and the psychiatric report dated 3 July 2015 and found that the appellant was not even medically insane. The learned judge found that the appellant's schizotypal personal disorder, mild intellectual disability and paraphilic disorder including sadism and fetishism, were not major mental illness. The learned judge had also considered the appellant's evidence which shows that he knew why he was arrested and that murder is wrong in law. The appellant's evidence were strongly corroborated by the psychiatrists in their reports which clearly stated that at the material time of the crime, the appellant was mentally stable.

[33] From the evidence adduced, the learned judge also found as follows:

(a) the appellant had planned the incident prior to the incident of the stabbing when he went to the convenience store to buy the knife;

(b) when the appellant attacked the deceased and PW6, he stopped when PW6 managed to get public attention and he then attacked PW6;

(c) after the attack, the appellant had fled the scene and ran away from the scene of the incident;

(d) while running away from the scene of the incident, the appellant threw away the knife that he used in the attack into the rubbish bin; and

(e) since then the appellant remained in hiding until he was arrested by the police. During the investigation, the appellant led a team of the policemen to the place where he had thrown away the knife and the police found the knife inside the bin that had been pointed by the appellant.

[34] The court found that the cumulative effects of all the facts as laid down led to one and only conclusion that at the time the appellant knew what he was doing and also knew what he was doing is wrong in law. Further, it did not also escape the learned judge's attention and he made the observation that the appellant was able to give evidence on oath and answered most of the questions in a rational manner without any too much difficulty. The appellant did not behave abnormally throughout the trial.

[35] In our view, the whole conduct of the appellant on the day of the incident, from the time he stabbed the deceased, attacked PW6, threw away the knife, fled the scene and ran away from the scene of the incident and hiding himself until arrested by police were patently inconsistent with acts of someone who was mentally unsound and incapable of knowing the nature and consequences of his acts. Such acts were consistent with the conduct of an intelligent person with a clear presence of mind. Hence, we were satisfied on the totality of the evidence that at the time of committing the offence, the appellant was not labouring under any form of unsoundness of mind and he knew that the nature of what he did was against the law. It was in fact a pre-meditated murder.

[36] We were also satisfied that the learned trial judge had applied the correct approach in determining whether the appellant had successfully proven a defence of insanity pursuant to s. 84 of the Penal Code.

The Conclusion

[37] Having considered the evidence before us in totality, we were satisfied that the learned trial judge had not committed any error in fact or in law that warrants our intervention. We found that the conviction was safe and well supported by the evidence. We had therefore dismissed the appeal and affirmed the conviction and sentence against the appellant handed down by the learned trial judge.